In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 254

BERNARD KAPLAN AND ALBERTO BERUMEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6-16) is reported at 375 F. 2d 895.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1967 (R. I, 111). A petition for rehearing was denied on April 18, 1967 (R. I, 112). On May 19, 1967, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including June 17, 1967. The petition was

filed on June 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, each of whom retained the same attorney and specifically consented to his representation of the other, may now claim that they were denied effective assistance of counsel by reason of a conflict of interest.

2. Whether the court, in a non-jury trial, erred in examining a statement and reports of a government witness in order to determine how long a recess defense counsel would need in order to examine the documents.

STATEMENT

In a jury-waived trial in the United States District Court for the Southern District of California petitioner Berumen was found guilty of passing a counterfeit $100 bill on two separate occasions (counts 2 and 4). Petitioner Kaplan was convicted of aiding and abetting codefendant Reinhardtsen in passing a counterfeit $100 bill and of possession of six counterfeit $100 bills (counts 3 and 5) (R. I, 4-7; R. IV, 372).[1]

The sufficiency of the evidence is not challenged. On December 6 and December 19, Berumen passed $100 bills at separate food stores after making small purchases (R. III, 26-28, 34-41, 134-138, 148-153).

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[1] Codefendant Reinhardtsen was found not guilty on counts 3 and 5, and he, Kaplan and Berumen were found not guilty on count 1, a conspiracy count (R. IV, 372).

On December 17, Kaplan and Reinhardtsen used a counterfeit bill to pay for the purchase of Christmas trees (R. III, 44-46, 96-99, 126-131). The six bills charged in count 5 were found in Kaplan's automobile after it had been seized for forfeiture because of its use in the December 17 transaction (see R. III, 174-179).

ARGUMENT

1. The indictment was returned on January 13, 1965. On January 25, attorney Beckler entered his appearance as counsel for petitioners Kaplan and Berumen. Not guilty pleas were entered on February 8, and trial was set for March 29, 1965 (R. I, 104). On March 9, attorney Beckler filed, on behalf of both petitioners, a motion for discovery and inspection (R. I, 28-32).

On March 29, 1965, the date originally set for trial, Mr. Beckler requested a continuance, stating that in a final interview with his clients two days before, he had discovered a "definite conflict of interest between the two defendants" (R. II, viii-ix). He did not specify what the conflict was. Government counsel stated that there has been no indication to him until about five minutes before court started that a continuance would be sought (R. II, xi). The court observed that it had "received word in the middle of the week that Mr. Kaplan was going to make a motion for a continuance based upon illness" (R. II, xii). The court granted a continuance for three days to the following Thursday (R. II, xiii). This colloquy followed (R. II, xiv-xv):

MR. BECKLER: Your Honor, I can arrange for Mr. Kaplan to have competent prepared counsel and we can answer ready today. I will have somebody that I recommend highly to him answer ready. * * * I will have counsel here to represent Mr. Kaplan answer ready today.

THE COURT: Are you ready to go to trial then tomorrow morning?

MR. BECKLER: Ready right now. Well, ready tomorrow morning. I'll call someone today and we will go over it tomorrow.

THE COURT: Very well. The matter will be set for trial then.

On the following day, March 30, 1965, Mr. Beckler announced that the "defendant Kaplan and defendant Berumen are ready to proceed" (R. III, 4). After separate waivers of jury trial by the three defendants (R. III, 4-10), government counsel stated that he understood from Mr. Beckler that any danger of conflict of interest had been cured and that it would be a good idea to get this "on the record" (R. III, 12). This colloquy then ensued (R. III, 12-14):

MR. BECKLER: I think that is good, your Honor. I can make a statement in that regard since our discussion in chambers as to an apparent conflict that was only limited to the possibility and contingency of a jury trial. Now that that matter has been disposed of, the conflict of interests—that is my representation of Mr. Berumen and Mr. Kaplan—is now satisfied. In short, there is no conflict. I feel I can adequately represent both of them and intend to, and I believe it is Mr. Kaplan's desire that I

proceed and go ahead with his representation during this matter.

THE COURT: Very well. I will inquire of Mr. Kaplan, are you aware of that position?

MR. KAPLAN: Yes, your Honor.

THE COURT: That might have been of some moment in the event of a jury trial, and you have discussed that fully?

MR. KAPLAN: Yes, we have resolved anything that might have come up.

THE COURT: Do you feel you have been fully advised as to all matters and you are fully satisfied then to proceed in trial with Mr. Beckler?

MR. KAPLAN: Yes, I sure have.

THE COURT: Mr. Berumen, I would like to ask the same thing of you. You understood this?

MR. BERUMEN: Yes, we talked it out and it is all straightened out.

THE COURT: You think now that without a jury trial there would be no occasion for any conflict or any conflict of any moment?

MR. BERUMEN: That is right.

THE COURT: And you are quite willing at this time to proceed in trial, represented by Mr. Beckler, having in mind that he also represents Mr. Kaplan?

MR. BERUMEN: Yes, sir.

In view of the lack of any showing of conflict of interest and the explicit statements by petitioners and their counsel that the alleged conflict had been resolved and that both petitioners wished to be represented by the same attorney, petitioners' claim that they were denied the effective assistance of counsel is clearly without merit. No possible conflict is suggested by the facts of the case.

The instant case is clearly distinguishable from *Glasser* v. *United States*, 315 U.S. 60, relied on by petitioners. In *Glasser* the trial judge, over Glasser's objection, had assigned Glasser's retained counsel to represent a codefendant, even though the attorney pointed out to the court that there was a conflict of interest because the evidence against Glasser would consist in large part of statements made by the codefendant in Glasser's absence. Here, on the other hand, the two defendants had retained the same counsel and expressly stated that they wanted him to continue to represent them, even though they had discussed the possibility of a conflict.

2. At a hearing on the motion to suppress the evidence as to the six counterfeit bills found in the car (filed by Reinhardtsen and joined in by Kaplan), agent Tomsic was called as a government witness to testify to the circumstances surrounding the questioning of Reinhardtsen and the seizure and search of the car.[2] Reinhardtsen's counsel asked for

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[2] Tomsic testified that he received a typewritten note, dated December 18, 1964, to the effect that a counterfeit $100 bill had been passed at the Kirk Company by a Mr. Brumer who was driving a white '63 or '64 Chevrolet with Ohio license plates, left front fender wrecked (R. III, 162-163). On the following day, after meeting Berumen at the Hollywood Police Station, Tomsic took him to the Kirk Company lot (R. III, 164-165, 170). Upon arrival there, Tomsic was informed by a Kirk employee that the man who had previously passed the counterfeit $100 bill was just getting in his car to leave (R. III, 170-171). This was Reinhardtsen, who was in the front seat of a 1963 Chevrolet with a dented left fender (R. III, 171). After being advised of his rights, Reinhardtsen said that he had

a ten minute recess so that he and petitioners' counsel could look over Tomsic's reports, which government counsel had, at the request of Reinhardtsen's counsel, given to defense counsel prior to Tomsic's testimony (R. III, 154-155). The court asked to see copies in order to determine how long a recess would be necessary. It then granted a ten minute recess (R. III, 156-157). When Tomsic was recalled to the stand both defense counsel raised the question whether the court had not looked at the material prematurely since no formal demand had been made (R. III, 159-161). Petitioners' counsel made no motion for relief saying (R. III, 162):

> I can't very well move to strike the court's reading of these certainly, so at this time I will just sit down.

Tomsic's reports were subsequently used for cross-examination by defense counsel (R. IV, 244-245, 254, 260) but were not introduced in evidence.

The claim that petitioners were prejudiced because the trial court read the reports before counsel made a formal motion under 18 U.S.C. 3500 is without merit. If 18 U.S.C. 3500(b) had been strictly followed and the defendants had made a motion to pro-

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given the $100 bill to the Kirk Company when Kaplan was with him and that the car belonged to Kaplan, who had been driving that day (R. III, 172, 173). Tomsic informed Reinhardtsen that the car would be seized since it had been used to carry a counterfeit bill (R. III, 174). On the following day (December 20) Tomsic, in a search of the car without a warrant, discovered the six counterfeit $100 bills in an envelope in the trunk (R, III, 179; R. IV, 189).

duce after conclusion of Tomsic's testimony on direct examination, it would have been proper for the court to examine the statement to determine if it was producible. To the extent that the reports contained incompetent or immaterial evidence, *e.g.*, evidence of prior convictions, the presumption is that the court disregarded such matter. *Clauson* v. *United States*, 60 F. 2d 694, 696 (C.A. 8); *United States* v. *Fairbanks*, 89 F. 2d 949, 953 (C.A. 9).[3] The case is readily distinguishable from one in which such material has come to the attention of lay jurors.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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JULY 1967

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[3] Questions which petitioners have not argued, but which they say will be raised should certiorari be granted (Pet. 2), are covered in the opinion of the court below (Pet. App. 13-16).

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